Affirmed and Opinion filed September 28, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01324-CR

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CONCEPCION CANTU, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 15
Harris County, Texas
Trial Court Cause No. 98-31104

O P I N I O N

Concepcion Cantu appeals her jury conviction for misdemeanor driving while intoxicated (DWI). The trial court assessed her punishment at 180 days confinement in the county jail, probated for one year, plus a $700.00 fine. In six issues, or points of error, appellant contends the trial court's jury charge was improper (issues one, two, and three), and the trial court erred in admitting evidence of an unadjudicated extraneous offense (issues four, five, and six). We affirm.

On August 2, 1998, at 11:49 p.m., Officer Donald Klepac stopped appellant for speeding. While checking her driver's license and insurance card, Klepac smelled a strong

odor of alcohol on appellant's breath and observed that her eyes were bloodshot. Klepac asked appellant if she had been drinking, and she told Klepac she had three or four mixed drinks. Before giving appellant her field sobriety tests, Klepac asked her if she was taking any medication. Appellant told Klepac she had a prescription for Robaxin, and she took a dose of it at 3:00 p.m. that day and another dose at 8:00 p.m. Appellant told Klepac that she had a back injury, and that Robaxin was a muscle relaxant prescribed for her condition. After appellant performed her field sobriety tests, Klepac concluded she was intoxicated.

Officer David Thomas was summoned to the scene, and he drove appellant to the police station for further testing. On the way to the police station, appellant told Thomas that her ex-husband was a police officer, and that Klepac probably knew him. Appellant indicated to Thomas that she felt the two officers were "setting her up." After Thomas video-taped appellant performing further sobriety tests, he asked Officer Nita Carmen to watch appellant while he went to another office. Officer Thomas testified that appellant did not do well on her sobriety tests, and he opined that she was intoxicated.

Appellant sat with another female DWI suspect in the hall while Officer Carmen kept watch over both of them. The other DWI suspect seemed upset, and Officer Carmen overheard appellant tell the suspect not to "worry about it." Officer Carmen testified that appellant told the suspect: "If any of them ever show up in my hospital, I will make sure they die and I will make it look like an accident." On cross-examination, appellant's counsel asked Carmen how this statement "made Ms. Cantu intoxicated." Officer Carmen answered that a normal person would not make such a statement threatening a police officer with the police officer sitting no more than two feet away. Officer Carmen opined that appellant's judgment was impaired, or that she was mad when she made this statement.

Officer Robert Kessler testified that appellant refused to take a breath test, and appellant signed the DWI statutory warning in his presence. The warning (DIC 24) was placed into evidence.

Dr. Rahn Bailey testified that Robaxin is a muscle relaxant. If a person drinks alcohol while using Robaxin, Dr. Bailey stated the combination could cause a "synergistic effect." Dr. Bailey explained that a "synergistic effect" occurs when certain medications are combined with another kind of agent producing a dually strong effect. He opined that taking two doses of Robaxin in the afternoon and drinking three our four alcoholic drinks later, the "lethargy and sedation that you might get with either . . . could be doubled or even more."

Appellant testified that: (1) she had "one-half" of one drink at a bar around 11:00 p.m. that night; (2) she was not speeding when Klepac stopped her; (3) she did not take Robaxin that day; (4) she said nothing to the female DWI suspect while Officer Carmen was watching them; and (5) she was never married to a police officer.

In her first three issues, appellant asserts the trial court's jury charge was improper because: (1) it authorized conviction on unpleaded elements; (2) she had insufficient notice of the added matter; and (3) it lowered the State's burden of proof. The offending portion of the jury charge provides:

> You are further instructed that if a Defendant indulges in the use of Robaxin to such an extent that she thereby makes herself more susceptible to the influence of alcohol than she otherwise would have been, and by reason thereof becomes intoxicated from recent use of alcohol, she would be in the same position as though her intoxication was produced by the use of alcohol alone.
>
> Now, therefore, if you find and believe from the evidence beyond a reasonable doubt that the Defendant, CONCEPCION CANTU, on or about the 2nd day of August, 1998, in Harris County, Texas did while intoxicated, namely, not having the normal use of her mental or physical faculties by the reason of the introduction of alcohol into her body, *either alone or in combination with Robaxin*, and did then and there operate a motor vehicle in a public place, you will find the Defendant guilty as charged in the information (emphasis added).

The information provides, in pertinent part:

> . . . CONCEPCION CANTU, hereafter styled the Defendant, heretofore on or about AUGUST 2, 1998, did then and there unlawfully while intoxicated, namely

> not having the normal use of his [*sic*] mental and physical faculties by the reason of the introduction of ALCOHOL into his [*sic*] body, operate a motor vehicle in a public place.

Review of alleged jury charge error requires that an appellate court make a two-fold inquiry: (1) whether error exists in the jury charge, and (2) whether sufficient harm was caused by the error to require reversal. *Abdnor v. State,* 871 S.W.2d726, 731 (Tex.Crim.App.1994). Because we find no error in the jury charge, we need not address the harmful error issue. *Id.*

The Texas Penal Code defines "intoxicated" as "not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or having a blood alcohol concentration of 0.10 or more." TEX. PEN. CODE ANN. § 49.01(2) (Vernons 1994 & Supp. 2000). Thus, the statute provides for either an objective standard (.10 blood alcohol concentration at the time of this offense) or a subjective standard (impaired mental or physical faculties by reason of introduction of alcohol) to determine intoxication. Because appellant refused a breath test, the State was required to prove she was intoxicated according to the more subjective standard that she did not have the normal use of her mental or physical faculties by reason of the introduction of alcohol. *See Atkins v. State,* 990 S.W.2d 763, 765 (Tex.App.-Austin 1999, pet. ref'd).

In issue one, appellant argues that the jury charge authorized her conviction on a theory not alleged in the information providing, in part, ". . . intoxicated . . . by reason of the introduction of alcohol into her body, *either alone or in combination with Robaxin*." Because the State did not plead that Robaxin contributed to appellant's intoxication, appellant argues that her conviction was on an element of the offense not in the information. Appellant cites *State v. Carter,* 810 S.W.2d 197, 200 (Tex.Crim.App. 1991) as authority for her contention. In *Carter,* the court of criminal appeals held that a charging instrument alleging driving while intoxicated must allege (1) which definition(s) of "intoxicated" the State will rely on at trial ("loss of faculties" or "per se") and (2) which type(s) of intoxicant the defendant

supposedly used. *Id*. In this case, the jury charge alleged intoxication by "loss of faculties" and that alcohol was used as the intoxicant, either alone or in combination with Robaxin.

The jury charge used by the trial court in this case was virtually identical to the jury charge found proper in *Sutton v. State*, 899 S.W.2d 682, 685 (Tex.Crim.App.1995). In that case, Sutton testified that he took two Klonopin [an antiseizure and antipanic CNS depressant] pills, and drank "two beers" thereafter. The *Sutton* jury charge alleged intoxication by "loss of faculties" and that alcohol was used as the intoxicant, *"either alone or in combination with Klonopin."* (emphasis added). *Id.* The court of criminal appeals held, in pertinent part:

> Rather, the charge at appellant's trial, when read carefully, allowed conviction only if the jury found that appellant had been intoxicated with alcohol, either alone or in combination with a drug that made him more susceptible to the alcohol. In either case, the jury had to find that appellant had been intoxicated with alcohol, not with the drug.

Sutton, 899 S.W.2d at 685.

The court of criminal appeals held the jury charge in *Sutton* did not expand on the allegations in the information. The information in *Sutton* was virtually identical to the information in this case, charging Sutton with DWI "in that [Sutton] did not have the normal use of his mental and physical faculties by the reason of the introduction of alcohol into [his] body." The jury charge in this case allowed conviction only if the jury found that appellant had been intoxicated with alcohol, either alone or in combination with a drug that made her more susceptible to the alcohol. Thus, the jury could find that the drugs made appellant more susceptible to alcohol, but the alcohol caused appellant's intoxication. *Sutton*, 899 S.W.2d at 685.

Appellant contends that *Sutton* was factually different because evidence of the use of drugs was introduced by Sutton as his defense. Therefore, appellant argues that Sutton opened the door to the synergistic effect instruction. In this case, evidence of the use of drugs was also raised by appellant by telling Officer Klepac she had ingested two doses of Robaxin before having "three or four drinks." At trial, she denied having taken Robaxin and claimed she

only drank "one-half" of "one drink" at a bar. The State introduced evidence that Robaxin would make a person more susceptible to alcohol intoxication. Appellant contends there was no evidence of her use of Robaxin other than Klebac's testimony. Appellant's argument goes to the weight of the evidence and credibility of the witnesses which was for the jury to decide. *Chambers v. State,* 805 S.W.2d 459, 462 (Tex.Crim.App. 1991). We find there was no error in the jury charge, and it correctly charged the jury with intoxication by the use of alcohol. We overrule appellant's contentions in issue one.

Appellant's argument in issues two and three concerning lack of notice and lowering the burden of proof for the State because the jury charge expanded the information is without merit. As was the case in *Sutton,* the jury charge in this case did not expand on the information because the jury had to find that appellant was intoxicated by use of alcohol. *Sutton*, 899 S.W.2d at 685. The jury could find appellant was intoxicated if they reasonably believed the drugs she used made her more susceptible to alcohol intoxication. *Id*. If the jury did not believe that appellant took Robaxin, they could find her guilty by the introduction of alcohol alone. *Id*. In either case, the jury would have to find that it was alcohol that caused her intoxication. We have found that a proper jury charge was used in this case; therefore, the information provided sufficient notice that the State would prove conviction by alcohol intoxication. As was the case in *Sutton,* the jury charge did not expand on the information; therefore, the burden of proof for the State was not lowered because it still had to prove that appellant was intoxicated by alcohol. *Sutton* is dispositive of this case. We overrule appellant's contentions in issues two and three.

In issue four, appellant contends the trial court erred in allowing evidence of appellant's alleged uncharged extraneous offense under rules 403 and 404(b), Texas Rules of Evidence. Appellant contends the statement purportedly made by her to the other female DWI suspect was a terroristic threat against the arresting police officers. The context of the statement was:

> "If any of them ever show up in my hospital, I will make sure they die and I will make it look like an accident."

Appellant's objection at trial to the testimony by Officer Nita Carmen concerning the statement made by appellant to the female DWI suspect in her presence was that it was "irrelevant and immaterial." The State contends the evidence was relevant to show impaired judgment which would be consistent with intoxication. Appellant's trial counsel asked Officer Carmen on cross-examination how appellant's statement indicated her intoxication. Officer Carmen replied that appellant's statement in her presence indicated appellant's judgment was impaired because no normal person would make a threat to police officers "with the police officer sitting no more than two feet away from her."

In *Moreno v. State*, 858 S.W.2d 453 (Tex.Crim.App.), *cert. denied*, 510 U.S. 966, 114 S.Ct. 445, 126 L.Ed.2d 378 (1993), the defendant argued rule 404(b), Texas Rules of Evidence, was violated by admission of testimony that, prior to the kidnaping and murder of the victim, he had told several people that he planned to kidnap and kill another individual. The court of criminal appeals rejected the defendant's contention that rule 404(b) required exclusion of that testimony:

> . . . the statements concerning [the defendant's] thoughts . . . were just that, inchoate thoughts. There is no conduct involved which alone or in combination with these thoughts could constitute a bad act or wrong, much less a crime. Absent this, [the defendant's] statements concerning his desire to kidnap and kill [the other individual] did not establish prior misconduct and thus were not expressly excludable under Rule 404(b), supra.

Id. at 463.

The complained of testimony in this case pertained to appellant's thoughts, not conduct. Rule 404(b) is not implicated. *See Massey v. State*, 933 S.W.2d 141, 153-154 (Tex.Crim.App. 1996). The admitted statement was not excludable as a "bad act" under rule 404(b).

Appellant objected to Officer Carmen's testimony as "irrelevant." Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence." TEX. R. EVID. 401. The trial court's rule 401 rulings will not be reversed absent an abuse of discretion. *Moreno*, 858 S.W.2d at 463.

Appellant denied that she was intoxicated. Appellant's statement was relevant because it reflected an impaired judgment which was consistent with intoxication, an element of the offense. Thus, it tended to prove that intoxication was more probable than it would be without the evidence of the statement. The trial court did not abuse its discretion in concluding that the testimony was relevant. *Id.* We overrule appellant's contentions in issue four.

In issue five, appellant contends the trial court erred in the sentencing phase of the trial in assessing punishment based upon the "threat." As part of appellant's probation conditions, the trial court required appellant to participate in an anger management treatment program. Appellant cites no authority and furnishes no argument to support her complaint that the trial court abused its discretion by considering her display of anger in requiring her to participate in an anger management program. Appellant has preserved nothing for review. *Heiselbetz v. State*, 906 S.W.2d 500, 512 (Tex.Crim.App. 1995). Appellant's contentions in issue five are overruled.

In issue six, appellant contends the "threat" was prejudicial and inflammatory under rule 403, Texas Rules of Evidence, and should have been excluded for these reasons. Appellant failed to object to the "threat" on rule 403 grounds. Appellant has waived his complaint on appeal that the evidence was unfairly prejudicial. TEX. R. APP. P. 33.1(a); *Montgomery v. State*, 810 S.W.2d 372, 388-89(Tex.Crim.App.1990)(opinion on reh'g). We overrule appellant's contentions in issue six.

We affirm the judgment of the trial court.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed September 28, 2000.

Panel consists of Justices Robertson, Sears, and Hutson-Dunn.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[*] Senior Justices Sam Robertson, Ross A. Sears, and D. Camille Hutson-Dunn, sitting by assignment.